91-151

No. _____

Supreme Court, U.S.
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1990

THE STATE OF TEXAS,
Petitioner,

v.

PINK WAYNE SLOAN,
Respondent.

On Petition for Writ of Certiorari
To the Court of Appeals for the Twelfth
Judicial District of Texas

PETITION FOR WRIT OF CERTIORARI

DAN MORALES
Attorney General
of Texas

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

WILL PRYOR
First Assistant
Attorney General

MARGARET PORTMAN GRIFFEY*
Assistant Attorney Geneal

MARY F. KELLER
Executive Assistant
Attorney General

P.O. Box 12548,
Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR PETITIONER

* *Counsel of Record*

QUESTION PRESENTED

Whether the court below properly extended the Fourteenth Amendment protections set forth in Batson v. Kentucky, 476 U.S. 79 (1986) to include de novo appellate review of the state's explanations for its exercise of peremptory challenges to minority venire members.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Petitioner[1] herein, by and through the Attorney General of Texas, and files this Petition for Writ of Certiorari to review the judgment of the Court of Appeals for the Twelfth Judicial District of Texas entered in this case on January 29, 1988.

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[1] For clarity, the petitioner will be referred to as "the state," and Respondent will be referred to as "Sloan."

OPINIONS BELOW

The opinion of the Court of Appeals reversing Sloan's conviction and sentence is attached to the petition as Appendix A. *Sloan v. State*, 809 S.W.2d 224 (Tex. App.--Tyler 1991). The Court of Appeals' denial of the state's motion for rehearing is attached as Appendix B. The opinion of the Texas Court of Criminal Appeals dismissing the state's petition for discretionary review has not yet been published and is attached as Appendix C.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered on April 24, 1991. The petition for writ of certiorari is filed within ninety days after final judgment in this case, and this Court's jurisdiction is invoked under the provisions of 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amend. XIV, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Sloan was indicted on April 25, 1986, in the 3rd Judicial District Court of Anderson County, Texas, for the offense of burglary of a building and was tried before a jury upon a plea of not guilty. On December 16, 1986, the jury found him guilty of the offense and assessed a sentence of seven years confinement in Texas Department of Criminal Justice with the recommendation that imposition of the sentence be suspended and that Sloan be placed on probation for five years. The Court sentenced Sloan in accordance with the jury's recommendation.

Sloan appealed his conviction and sentence to the Twelfth Court of Appeals of Texas, which reversed his conviction, holding that the state's use of a peremptory challenge to exclude a black venire member in that case violated *Batson v. Kentucky*, 476 U.S. 79 (1986). (App. A). The state's motion for rehearing was denied on March 10, 1988. The state challenged the determination of error under *Batson* in its petition for discretionary review to the Texas Court of Criminal Appeals, which was denied on April 24, 1991. (App. C).

B. Statement of Facts

The facts pertaining to the state's use of a peremptory challenge to exclude venire member Smith are set forth in the opinion of the Court of Appeals as follows:

> The record shows that some blacks were on the panel of prospective jurors, but no blacks served on the petit jury in

the case. It is undisputed that the State peremptorily challenged one black prospective juror, Mrs. Warren Smith.

The State's voir dire examination of Mrs. Smith is as follows:

MR. HANDORF: Ms. Smith, Ms. Warren Smith, are you a married lady?

VENIREMAN SMITH: Yes, I am.

MR. HANDORF: What does your husband do for a living?

VENIREMAN SMITH: Works on the railroad.

MR. HANDORF: Union Pacific?

VENIREMAN SMITH: Yes.

MR. HANDORF: How long has he been so employed?

VENIREMAN SMITH: I beg your pardon?

MR. HANDORF: How long has he worked for them?

VENIREMAN SMITH: Twenty-two or twenty-three years.

MR. HANDORF: Do you work outside the home?

VENIREMAN SMITH: No.

MR. HANDORF: Do y'all have any children?

VENIREMAN SMITH: We have six.

MR. HANDORF: Okay. Any of them at home?

VENIREMAN SMITH: I have one at home.

MR. HANDORF: One at home?

VENIREMAN SMITH: Yes.

MR. HANDORF: What is your religious preference?

VENIREMAN SMITH: Church of God.

MR. HANDORF: What are the ages of your children left at home? Do you have any in the 20's?

VENIREMAN SMITH: My youngest one at home is 16. I have one 17.

MR. HANDORF: Do they go to school in Anderson County?

VENIREMAN SMITH: Westwood.

MR. HANDORF: Okay. Mighty fine. Thank you ma'am. . . .

Following a recess during which the parties exercised their respective peremptory challenges, and before the panel of

jurors was dismissed and the petit jury sworn, Sloan objected to the impaneling of the jury "for the reason that the prosecution [sic] has engaged in selective and systematic excusing [sic] of jurors in that the sole black juror that was on the panel, Mrs. Warren Smith, was struck with a peremptory strike by the prosecution [sic].

Sloan then called the prosecutor, District Attorney Richard Handorf, as a witness in support of his objection. Handorf testified that he struck Smith, who was the only black "on the panel left to be struck," and that the jury selected contained no blacks. He also stated that "only two other blacks that were within striking range were excused based on [his] challenge for cause."

Handorf, in response to defense counsel's inquiry why he struck Smith, stated:

A: As I recall Mrs. Smith, she was a tall lady and got up and answered her questions in, I thought, a very weak way. She did not appear to have any interest in the case from my observation. I felt like that she was a person that would not take any interest in it one way or another, and I struck her along with any number of others for the same reason.

On cross-examination by the prosecutor, Mr. Handorf testified as follows:

Q. Did you strike her because she was black?

A. No, sir. I think the record will show that in the past probably the majority of the cases that's been tried this year have been tried with probably black defendants on it. We do not strike blacks as a matter of course or as a systematic way of removing them from the jury. This has occurred in many cases involving black defendants. Blacks have served on many of the juries this year involving black defendants.

The trial court overruled Sloan's objection to the prosecutor's peremptory challenge of Smith, as well as his motion for mistrial. The trial court gave no reasons for his ruling, and although a hearing was conducted on Sloan's *Batson* objection, no written findings and conclusions were made.

(App. A 3-6).

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT

The decision of the court of appeals directly contravenes the Court's decision in *Hernandez v. New York*, ___ U.S. ___, 49 CrL 2192 (May 28, 1991), by: (1)

concluding that Fourteenth Amendment protections set forth in *Batson v. Kentucky* require *de novo* appellate review of the trial court's assessment of the credibility of the prosecutor's race-neutral explanation for the exercise of peremptory challenges to minority venire members, and (2) concluding that *Batson* requires not only a race-neutral reason for the state's peremptory challenges, but also requires a demonstration, on the record, of bias against the state or in favor of the defendant. For this reason, the writ of certiorari should be granted, the judgment below vacated, and the case remanded to the court of appeals for reconsideration in light of *Hernandez.*

II.

THE COURT OF APPEALS IMPROPERLY EXTENDED THE FOURTEENTH AMENDMENT PROTECTIONS SET FORTH IN *BATSON* TO REQUIRE *DE NOVO* APPELLATE REVIEW OF THE STATE'S EXERCISE OF PEREMPTORY CHALLENGES TO MINORITY VENIRE MEMBERS.

The court of appeals incorrectly concluded, contrary to the determination of the trial court, that *Batson*'s requirement of a race-neutral explanation for the State's exercise of peremptory challenges to minority venire members was not satisfied by the prosecutor's explanation that he struck venire member Smith because she answered the questions weakly and the prosecutor perceived that she had little interest in the case. The court of appeals' conclusion was incorrectly premised on the assumption that, under *Batson,* it is incumbent upon a reviewing court to reassess the credibility of a prosecutor's race-neutral

explanation for a peremptory challenge. Thus, although the trial court accepted the prosecutor's explanation and overruled Sloan's objection to the use of the peremptory challenge to Smith, the court of appeals reevaluated the credibility of that explanation and found that it did not constitute a reasonable trial-related explanation because, based on its reading of the record, it found Smith's answers to be direct and complete and because the prosecutor's questioning of Smith did not seek to discover facts and circumstances suggesting bias. Following *Hernandez v. New York*, it is clear that the court of appeals' grant of relief is based on a misunderstanding of the requirements of *Batson*.

"[T]he Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race." *Powers v. Ohio*, ___ U.S. ___, ___, 111 S.Ct. 1364, 1370 (1991); *Batson v. Kentucky*, 476 U.S. at 84. In *Batson*, the Court set forth a three-step analysis for evaluating whether a prosecutor's exercise of peremptory challenges violates equal protection:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. New York, 49 CrL at 2194, *citing Batson v. Kentucky*, 476 U.S. at 96-98. The requirement of a

race-neutral explanation is satisfied where the prosecutor's reason for the challenge is something other than race. *Hernandez v. New York*, 49 CrL at 2194, 2198 (O'Connor, J., concurring). Unless discriminatory intent is inherent in the explanation, the reason offered should be deemed race neutral. *Id.* at 2194. With respect to the final determination, whether the defendant has established purposeful discrimination, *Batson* mandates only that the trial court evaluate the credibility of the proffered explanation in light of the defendant's evidence of discriminatory exercise of peremptory challenges. Under *Batson,* the ultimate burden of persuading the court that the prosecutor's challenges are attributable to a racially discriminatory purpose lies with and never shifts from the defendant. *Batson v. Kentucky*, 476 U.S. at 94 n. 18, *citing Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981).

In *Hernandez*, the Court rejected the assertion that the Constitution requires appellate courts to independently determine whether peremptory challenges were exercised with discriminatory intent. *Hernandez*, 49 CrL at 2196. Rather, the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact which is entitled to great deference on appeal, and the constitutional mandate of *Batson* only requires an appellate court to reject the trial court's determination if it was clearly erroneous. *Id.* at 2195, 2197. The deference due the trial court's assessment rests on the nature of the determination.

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding will "largely turn on evaluations of credibility."

> 476 U.S. at 98, n.21. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." *Wainwright v. Witt*, 469 U.S. 412, 428 (1985), citing *Patton v. Yount*, 467 U.S. 1025, 1038 (1984).

Hernandez v. New York, 49 CrL at 2196. The *de novo* review undertaken by the court of appeals in this case is neither required by nor consistent with the constitutional protections set forth in *Batson* and its progeny, and the court of appeals' reliance on federal constitutional protections as authorizing such review is inappropriate.

Further, even if the federal constitution authorized the court of appeals to undertake a *de novo* review of the state's proffered explanations for peremptory challenges to minority venire members, the court of appeals' analysis in this case misconstrues the scope of the constitutional protections afforded by *Batson* and its progeny. The court below incorrectly equates *Batson*'s requirement of a racially neutral explanation related to the particular case to be tried with a showing of bias in favor of Sloan or prejudice against the laws or facts upon which the state relied. Following *Hernandez*, it is clear that *Batson* does not limit the state's use of peremptory challenges to those circumstances in which

it can demonstrate bias in favor of the defendant or prejudice against the state's case, but rather merely requires that a strike be based on something other than race. *Hernandez v. New York*, 49 CrL at 2194, 2198 (O'Connor, J., concurring); *see also Batson v. Kentucky* 476 U.S. at 97 (prosecutor's explanation need not rise to level justifying exercise of a challenge for cause). "Absent intentional discrimination violative of the Equal Protection Clause, parties should be free to exercise their peremptory challenges for any reason, or no reason at all." *Hernandez v. New York*, 49 CrL at 2198 (O'Connor, J., concurring).

The prosecutor's explanation that he did not want a disinterested juror was both race-neutral and related to the case, and, because there was no discriminatory intent inherent in the prosecutor's explanation in this case, the trial court was entitled to deem it race-neutral. *See Hernandez v. New York*, 49 CrL at 2194. As noted in the dissenting opinion to the Court of Criminal Appeals' dismissal of discretionary review, the state correctly asserted in its brief: "The State's burden of proof, beyond a reasonable doubt, requires an alert, watchful, comprehending jury. Disinterest by a juror is a threat to the State's case and to justice as a whole. It is related to the application of the facts of the case and the law by the jury." Further, a juror's disinterest is a factor that is properly evaluated by the trial court, and a reviewing court is particularly unlikely to be able to discern, from a review of the record on appeal, whether the prosecutor in fact provided a race-neutral basis for the exercise of a peremptory challenge or whether it was pretextual. Under such circumstances, the court of appeals could not have found, and indeed did not purport to find, that the trial court's determination was clearly erroneous.[2]

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[2] The court of appeals found that the trial judge abused his discretion by finding a race-neutral explanation.

In addition, the court of appeals improperly allocated the burden of proof. By requiring the state to conduct its voir dire in a manner that will enable it to demonstrate actual bias or prejudice on the part of the venire members, the court of appeals in essence places on the state the burden of disproving intentional discrimination rather than holding the defendant to his burden of affirmatively demonstrating intentional discrimination.

While it may be permissible, as a matter of state law, to limit the parameters of the state's legitimate exercise of peremptory challenges to minority venire members, *see Batson v. Kentucky*, 476 U.S. at 91 (the Constitution does not confer right to peremptory challenge), and while state law may extend greater protections to defendants than those authorized by the federal constitution, *see Cooper v. California*, 386 U.S. 58, 63 (1967), the court below did not purport to rely on either of these alternative theories. *Hernandez* demonstrates that the reliance of the court below on *Batson* for its unprecedented limitation on the state's exercise of peremptory challenges is incorrect.

CONCLUSION

For the foregoing reasons, the state respectfully requests that the writ of certiorari to the Court of Appeals for the Twelfth Judicial District issue, that the judgement in this case be vacated, and that the case be remanded to the court below to be resolved in accordance with *Hernandez v. New York*.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant
Attorney General

MARY F. KELLER
Executive Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

---

*MARGARET PORTMAN GRIFFEY
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080
Fax No. (512) 463-2084

ATTORNEYS FOR PETITIONER

* *Counsel of Record*

APPENDIX A

NO. 12-87-00027-CR
IN THE COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT
TYLER, TEXAS

PINK WAYNE SLOAN, APPELLANT	§	APPEAL FROM THE THIRD
VS.	§	JUDICIAL DISTRICT COURT OF
THE STATE OF TEXAS, APPELLEE	§	ANDERSON COUNTY, TEXAS

Pink Wayne Sloan was convicted of burglary of a building by a jury who assessed his punishment at seven years' confinement. The jury recommended probation for a period of five years. Accordingly, the trial judge suspended imposition of sentence and placed Sloan on probation for that term of years.

We reverse and remand.

Sloan urges five points of error. Under his first three points, he claims *Batson*[1] error.

By his fourth point of error he attacks the court's charge at the guilt-innocence phase, claiming the court erred in charging the jury in the abstract that a person commits burglary "if, without the effective consent of the owner, he enters a building . . . not then open to the public with intent to commit *a felony or* any theft." (Emphasis added.)

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[1] *Batson v. Kentucky*, 106 S. Ct. 1712 (1986).

He asserts by his fifth point of error that the trial court erred in including in its charge a definition of the word "building" to mean "any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament or use."

The evidence shows that Sloan entered into a building occupied by Citizens Credit Union by breaking the glass out of a window at ground level.

The police were alerted to the burglary by a silent alarm and Sloan was apprehended while still in the building by police officers shortly after 3:00 a.m. on April 3, 1986.

In addressing Sloan's point four, we note that the court's charge instructs the jury: "Before you would be warranted in finding defendant guilty, you must be satisfied from the evidence beyond a reasonable doubt that the entry, if any, in the building was so made with the intent to commit the *specific crime of theft*." (Emphasis ours.) The court in paragraph 5 of the charge, the paragraph of the charge applying the law of burglary to the facts, properly so charged the jury.

Considering the charge in its entirety, we conclude the error in including the phrase "with intent to commit a felony or" in the abstract definition of burglary, did not harm Sloan. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Cr. App. 1984). Sloan's fourth point is overruled.

After consideration of Sloan's fifth point of error, we conclude that the inclusion of the word "habitation" in the court's definition of "building"[2] did not harm Sloan. The evidence clearly demonstrates that the

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[2] *See* Tex. Penal Code Ann. § 30.01(2) (Vernon 1979).

building entered by Sloan was not a habitation but an "enclosed structure" used as offices for a credit union. Neither *Toler v. State*, 546 S.W.2d 290 (Tex. Cr. App. 1977), nor *Dowden v. State*, 537 S.W.2d 5 (Tex. Cr. App. 1976), mandate reversal here. Under *Almanza's* rule, we conclude the error is harmless. Sloan's fifth point of error is overruled.

By his first three points of error Sloan argues that the State's peremptory challenge of the sole black juror "within striking distance" remaining on the panel of jurors constituted "purposeful [racial] discrimination"[3] condemned in *Batson*.

The record shows that some blacks were on the panel of prospective jurors, but no blacks served on the petit jury in the case. It is undisputed that the State peremptorily challenged one black prospective juror, Mrs. Warren Smith.

The State's voir dire examination of Mrs. Smith is as follows:

> MR. HANDORF: Ms. Smith, Ms. Warren Smith, are you a married lady?
>
> VENIREMAN SMITH: Yes, I am.
>
> MR. HANDORF: What does your husband do for a living?
>
> VENIREMAN SMITH: Works on the railroad.
>
> MR. HANDORF: Union Pacific?

---

[3] In violation of the Equal Protection Clause of the Fourteenth Amendment.

VENIREMAN SMITH: Yes.

MR. HANDORF: How long has he been so employed?

VENIREMAN SMITH: I beg your pardon.

MR. HANDORF: How long has he worked for them?

VENIREMAN SMITH: Twenty-two or twenty-three years.

MR. HANDORF: Do you work outside the home?

VENIREMAN SMITH: No.

MR. HANDORF: Do y'all have any children?

VENIREMAN SMITH: We have six.

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VENIREMAN SMITH: My youngest one at home is 16. I have one 17.

MR. HANDORF: Do they go to school in Anderson County?

VENIREMAN SMITH: Westwood.

MR. HANDORF: Okay. Mighty fine. Thank you ma'am. . . .

Following a recess during which the parties exercised their respective peremptory challenges, and before the panel of jurors was dismissed and the petit jury sworn, Sloan objected to the impaneling of the jury "for the reason that the prosecution [sic] has engaged in selective and systematic excusing [sic] of jurors in that the sole black juror that was on the panel, Mrs. Warren Smith, was struck with a peremptory strike by the prosecution [sic]."

Sloan then called the prosecutor, District Attorney Richard Handorf, as a witness in support of his objection. Handorf testified that he struck Smith, who was the only black "on the panel left to be struck," and that the jury selected contained no blacks. He also stated that "only two other blacks that were within striking distance were excused based on [his] challenge for cause."

Handorf, in response to defense counsel's inquiry why he had struck Smith, stated:

> A. As I recall Mrs. Smith, she was a tall lady and got up and answered her questions in, I thought, a very weak way. She did not appear to have any interest in the case from my observation. I felt like that she was a person that would not take any interest in it one way or another, and I struck her along with any number of others for the same reason.

On cross-examination by the prosecutor, Mr. Handorf testified as follows:

> Q. Did you strike her because she was black?
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> A. No, sir. I think the record will show that in the past probably the majority of the cases that's been tried this year have been tried with probably black defendants on it. We do not strike blacks as a matter of course or as a systematic way of removing them from the jury. This has occurred in many cases involving black defendants. Blacks have served on many of the juries this year involving black defendants.

The trial court overruled Sloan's objection to the prosecutor's peremptory challenge of Smith, as well as his motion for mistrial. The trial court gave no reasons for his ruling, and although a hearing was conducted

on Sloan's *Batson* objection, no written findings and conclusions were made.

Because of the crucial role of the trial judge in passing initially on claimed *Batson* error, the Court of Criminal Appeals has suggested[4] that the trial court make written findings of fact and law presented in such hearings relevant to the claim of the defendant that he has been the victim of racial discrimination by the prosecutor's exercise of peremptory strikes in his case. However, in the case before us, there are no conflicting fact issues pertinent to the points of error under consideration. The trial judge having conducted the voir dire examination heard the questions of the prosecutor and the responses of Smith. He also heard the undisputed testimony offered by both Sloan and the State on the *Batson* issue. The court's action in overruling the objection and motion for mistrial necessarily implies that he concluded under the circumstances that the State's peremptory challenge of Smith did not amount to racial discrimination under *Batson's* rule. Hence, in our judgment no useful purpose would be served by abating this appeal and remanding the cause for entry of written findings of fact and conclusions of law. In *Keeton*, our Court of Criminal Appeals interpreted *Batson* as holding "that the State's purposeful or deliberate denial of jury participation to black persons because of race violates a [black] defendant's rights under the equal protection clause of the [Fourteenth Amendment]." The *Keeton* court also concluded that under *Batson* a defendant in order to invoke the protection of the equal protection clause, must establish the State's "purposeful [racial] discrimination by showing that:

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[4] *See Keeton v. State*, 724 S.W.2d 58, 67 (Tex. Cr. App. 1987).

1. he was a member of a cognizable racial group;[5]

2. the prosecutor had exercised peremptory challenges to remove the venire members of the defendant's race;

3. the facts and any other relevant circumstances raise an inference that the [prosecutor] used peremptory challenges to exclude the veniremen on account of their race."

Keeton, 724 S.W.2d at 65; *see also Batson*, 106 S. Ct. 1723.

Batson also teaches that trial judges "will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Id.* The rule in *Batson* further provides that once the minority defendant has made a prima facie showing of racial discrimination, "the burden shifts to the State to come forward with a [racially] neutral explanation [for the challenge]." *Id.* The "explanation need not rise to the level justifying exercise of a challenge for cause," *Id.*, but may not consist only of an assertion by the prosecutor, based on his intuition or assumption that Black jurors would favor black defendants "because of their shared race." *Id.* (citations omitted).

Batson makes it clear that whether intentional racial discrimination occurs is a fact question, the answer to which necessarily depends in some degree on the credibility of the prosecutor involved. Thus, "a

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[5] Sloan made this showing only by reasonable implication. The State has filed no brief in this case.

reviewing court ordinarily should give [a trial judge's findings] great deference." *See Batson*, 106 S. Ct. at 1724 n. 21 (citations omitted). However, the rule in *Batson* requires the articulation by the prosecutor of "a neutral explanation related to the particular case [on trial]."

Sloan argues that he established a prima facie case of racial discrimination. He asserts that, given the perfunctory nature of the prosecutor's questions to Smith on voir dire, the prosecutor's explanation of his reasons for striking Smith do not satisfy *Batson's* requirements. We agree. The prosecutor's brief voir dire examination of Smith only brought out information about the juror related to her marital status, her family, her religious preferences, her employment, her husband's work history, and the ages of her children. The explanation given by the prosecutor for the strike that was related to the case was that Smith answered the questions weakly, and that he perceived that the juror had little interest in the case.

From our reading of the record, we find that Smith gave direct and complete answers to each routine question asked her. Indeed, no question was propounded by the prosecutor that sought to discover facts or circumstances suggesting that the juror might lean in favor of Sloan in the trial. Considering the undisputed facts and circumstances here presented, we conclude that the reasons given by the prosecutor to support his peremptory challenge of Smith do not constitute a reasonable trial related explanation sufficient to rebut Sloan's prima facie case of racial discrimination. The trial judge abused his judicial

discretion by his implied finding to the contrary. Points one, two, and three are sustained. *Batson* and *Keeton*.[6]

We doubt that the racial discrimination committed by the State caused Sloan any harm,[7] but are persuaded that the federal constitutional error here involved is one that "'affects substantial rights' [of Sloan]," *Chapman v. California*, 386 U.S. 18, 23 (1967), and therefore, cannot be treated as harmless error. *Id.*; *see also Fahy v. Connecticut*, 375 U.S. 35 (1963).

The judgment of conviction is reversed and the cause is remanded for a new trial.

PAUL S. COLLEY
Justice

Opinion delivered January 29, 1988.

(PUBLISH)

[6] The *Keeton* court interprets *Batson* to mean that where even one juror is improperly challenged, the rule in *Batson* comes into play. *Keeton*, 724 S.W.2d at 65 n. 5.

[7] Because the record reveals that the evidence of his guilt was overwhelming, and that probation was recommended by the all-white jury.

Court of Appeals

12th Court of Appeals District,
Tyler, Texas

I, Barbara A. Holman, Clerk of the Court of Appeals of the Twelfth Court of Appeals District of the State of Texas, hereby certify that the foregoing 8 pages contain a true and correct copy of the Opinion filed in said court on the 29th day of January, 1988 in the following numbered and entitled cause:

PINK WAYNE SLOAN

No. 12-87-00027-CR vs.

THE STATE OF TEXAS

on Appeal to said court from Anderson County, Texas.

WITNESS MY HAND and the seal of said Court, at Tyler, Texas

this the 28th day of March, 1988

_____

Barbara A. Holman, Clerk

_____

Deputy

APPENDIX B

COURT OF APPEALS

Twelfth Court of Appeals District
306 County Courthouse
Tyler, Texas 75702

Notice (214) 593-8471

January 29, 1988

JUDGMENT

12-87-00027-CR PINK WAYNE SLOAN VS. THE STATE OF TEXAS

From Anderson County

This cause came on to be heard on the Transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be reversed and the cause remanded for a new trial in accordance with the opinion of this Court, and that this decision be certified below for observance.

Opinion by Justice Paul S. Colley.

March 10, 1988

12-87-00027-CR - PINK WAYNE SLOAN V. STATE OF TEXAS -Anderson County

State's Motion for Rehearing having been duly considered, it is ORDERED that said motion be, and it hereby is, OVERRULED.

Recorded in Minute Book 5, page 383.

Court of Appeals

12th Court of Appeals District,
Tyler, Texas

I, Barbara A. Holman, Clerk of the Court of Appeals of the Twelfth Court of Appeals District of the State of Texas, hereby certify that the foregoing 2 pages contain a true and correct copy of the Judgment and Order Overruling Motion for Rehearing filed in said court on the 29th day of January and the 10th day of March, 1988, respectively in the following numbered and entitled cause:

PINK WAYNE SLOAN

No. 12-87-00027-CR vs.

THE STATE OF TEXAS

on Appeal to said court from Anderson County, Texas.

WITNESS MY HAND and the seal of said Court, at Tyler, Texas

this the 28th day of March, 1988

_____

Barbara A. Holman, Clerk

_____

Deputy

APPENDIX C

PINK WAYNE SLOAN, Applicant
No. 305-88 v.
THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Twelfth Court of Appeals

[ANDERSON County]

OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

A jury convicted appellant of burglary of a building and assessed punishment at seven years confinement, probated. The Tyler of Court of Appeals, relying on *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), and *Keeton v. State*, 724 S.W.2d 58 (Tex.Cr.App. 1987), found the State improperly utilized a peremptory challenge to exclude from the jury the only member of appellant's race and reversed the conviction. *Sloan v. State*, No. 12-87-00027-CR ___ S.W.2d ___ (Tex. App.--Tyler delivered January 29, 1988).

We granted the State's petition for discretionary review to determine the correctness of the Court of Appeals' holding. After reviewing the Court of Appeals' opinion, the briefs and the record, we conclude that the Court of Appeals reached the correct result and that our decision to grant this petition was improvident. Tex. R. App. Pro. Rule 200 (k). As in every case where we determine that the decision to grant review was improvident we do not necessarily adopt either the language or reasoning of the lower court.

The State's petition for discretionary review is dismissed.

PER CURIAM

(Delivered April 24, 1991)

En Banc

Publish

PINK WAYNE SLOAN, Appellant

No. 305-88, v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Twelfth Court of Appeals

(Anderson County)

DISSENTING OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

A jury convicted appellant, Pink Wayne Sloan, of burglary of a building and assessed a sentence of seven years' confinement with the sentence being probated. He appealed. The Tyler Court of Appeals found that the State had improperly utilized its peremptory challenges to exclude from the jury one member of appellant's race. Sloan v. State, ___ S.W.2d ___ (Tex.App. - Tyler, No 12-87-00027- CR, delivered January 29, 1988). The State sought discretionary review from this Court and we granted same to determine the correctness of the Court of Appeals' holding. Today the majority permits an incorrect opinion to stand as precedent by improvidently granting the State's petition. I must dissent.

After the voir dire of the venire in this case, the State used one of its peremptory challenges to remove a potential juror that was of the same race as appellant. Appellant objected "for the reason that the prosecution has engaged in selective and systematic excusing [of] the sole black juror." See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Although the trial judge did not explicitly find a prima facie showing of discrimination, he nonetheless allowed the defense to question the prosecutor regard-

ing the use of his peremptory challenge. The prosecutor then explained:

> "As I recall Mrs. Smith, she was a tall lady and got up and answered her questions in, I thought, a very weak way. She did not appear to have any interest in the case from my observation. I felt like that she was a person that would not take any interest in it one way or another, and I struck her along with any number of individuals for the same reason."

When asked if he struck the potential juror because she was black, the prosecutor testified:

> "No, sir. I think the record will show that in the past probably the majority of the cases that's been tried this year have been tried with probably black defendants on it. We do not strike blacks as a matter of course or as a systematic way of removing them from the jury. This has occurred in many cases involving black defendants. Blacks have served on many of the juries this year involving black defendants."

After these explanations, the defense attorney did absolutely nothing. He did not question the prosecutor. He did not call the venireman to the stand. He presented no documentary evidence. He did not attempt to compare the challenged venireman with any other that was not challenged. *He did not even voice his disapproval.* In short, the defense in the case did nothing to remotely contest the prosecutor's explanation. The trial court, with nothing further to go on, overruled without elaboration appellant's objection to the prosecutor's use

of his challenge. The Court of Appeals, however, disagreed with the trial court's holding.

The lower appellate court observed that "a reviewing court ordinarily should give a trial judge's findings great deference." ___ S.W.2d at ___, slip op.p. 7, citing *Batson*, 476 U.S. at 98, n. 21, 106 S.Ct. at 1724 n. 21. The Court of Appeals noted, however, that *Batson* also requires the prosecutor to specifically articulate "a neutral explanation related to the particular case on trial." ___ S.W.2d at ___, slip op. p.7. The court then determined that the prosecutor in this case failed to give such a trial related explanation. The Court of Appeals wrote:

> "[Appellant] argues that he established a prima facie case of racial discrimination. He asserts that, given the perfunctory nature of the prosecutor's questions to Smith on voir dire, the prosecutor's explanation of his reasons for striking Smith do not satisfy Batson's requirements. We agree. The prosecutor's brief voir dire examination of Smith only brought out information about the juror related to her marital status, her family, her religious preferences, her employment, her husband's work history, and the ages of her children. The explanation given by the prosecutor for the strike... was that Smith answered the questions weakly, and that he perceived the juror had little interest in the case.
>
> "From our reading of the record, we find that Smith gave direct and complete answers to each routine question asked her. Indeed, no question was propounded by the prosecutor that sought to discover

> facts and circumstances suggesting that the juror might lean in favor of [appellant] in the trial. Considering the undisputed facts and circumstances here presented, we conclude that the reasons given by the prosecutor to support his peremptory challenge of Smith do not constitute a reasonable trial related explanation sufficient to rebut [appellant's] prima facie case of discrimination." ___ S.W.2d at ___, slip op. p.7.

In its petition for discretionary review, the State attacked the Court of Appeals' holding for two reasons. First, the State asserted that the Court of Appeals' finding that the State's peremptory challenge was not passed upon a reasonable "trial related explanation" was incorrect. In its brief on the merits, the State explained: "The State's burden of proof, beyond a reasonable doubt, requires an alert, watchful, comprehending jury. Disinterest by a juror is a threat to the State's case and to justice as a whole. It is related to the application of the facts of the case and the law by the jury." Second, the State asserted that the Court of Appeals' holding improperly forces the State to elicit biased responses from prospective jurors in order to safely exercise a peremptory challenge. The State, noting that a biased response would allow the State to challenge the prospective juror for cause, argued that the Court of Appeals' holding would in effect eliminate the use of peremptory challenges against any member of the venire that is of the same race as the defendant. Both of the State's arguments are meritorious and the majority by placing its "improvidently granted" stamp on the Court of Appeals' opinion leaves as precedent a decision that misconstrues *Batson* and demonstrates a complete lack of understanding of the Supreme Court's treatment of the issues.

In *Batson*, the Supreme Court reaffirmed prior holdings which precluded, as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the use of peremptory challenges to exclude members from jury service solely because of the members' race. See *Batson*, 476 U.S. at 84, citing Swain v. Alabama, 380 U.S. 202, 203-204, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). See generally *Batson*, 476 U.S. at 84 n. 3. The Court, however, broke away from prior holdings to alter the manner in which an aggrieved party may establish the discriminatory use of peremptory strikes. Under *Batson*, once the defendant makes out a "prima facie" showing of discrimination, the burden shifts to the State to explain adequately the use of its strikes. *Batson*, 476 U.S. at 94. Moreover, the *Batson* Court articulated that the State's burden to explain cannot be met by a prosecutor's "mere general assertions" that he did not discriminate or that he properly performed his official duties. Id. "Rather, the State must demonstrate that 'permissible racially neutral selection criteria and procedures have produced the monochromatic result.'" Id., quoting Alexander v. Louisiana, 405 U.S. 625, 632, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). The Supreme Court reasoned that if "general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" 476 U.S. at 98. Because of this, the Court concluded, "the prosecutor must articulate a neutral explanation related to the particular case to be tried." Id. In a footnote, the Court added:

> "The Court of Appeals for the Second Circuit observed in McCray v. Abrams, 750 F.2d [1113], 1132 [(2nd Cir. 1984)], that 'there are any number of basis' on which a prosecutor may believe that it is desirable to strike a juror who is not ex-

> cusable for cause. As we explained in another context, however, the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." Id, quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

It is highly significant that the Supreme Court referred to a Title VII case in order to clarify its position of what was meant by a "neutral explanation." By invoking *Burdine*'s analysis of the burden of proof in a suit brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), I understand that the Court intended to adopt a similar burden[1] in a *Batson* problem; that is:

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[1] *Burdine* was an extension of the Court's holding in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In *McDonnell Douglas* the Court first set forth the basic allocation of burdens of proof and persuasion in a Title VII case. 411 U.S. at 800-805. The Court in *Burdine* paraphrased the holding in *McDonnell Douglas* as follows:

> "First, the plaintiff has the burden of proving... a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were pretext for discrimination.
>
> "The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the

(footnote continued on next page)

"The burden that shifts to [the prosecutor], therefore, is to rebut the presumption of discrimination by producing evidence that the [venireman] was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason. The [prosecutor] need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the [prosecutor's] evidence raises a genuine issue of fact as to whether it discriminated against the [venireman]. To accomplish this, the [prosecutor] must clearly set forth, through the introduction of admissible evidence, the reasons for the [venireman's] rejection. *The explanation provided must be legally sufficient to justify a judgment for the [prosecutor].* If the [prosecutor] carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. *Placing this burden of production on the [prosecutor] thus serves simultaneously to meet the [defendant's] prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the [defendant] will have a full and fair opportunity to demonstrate pretext. The sufficiency of the [prosecutor's]*

(footnote continued from previous page)

defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 252-253.

This allocation of burdens of proof and persuasion is the same as that to be used in a *Batson* problem.

> *evidence should be evaluated by the extent to which it fulfills these functions. Burdine*, 450 U.S. at 254-256 (footnotes and citations omitted; emphasis added).[2]

Thus, to satisfy *Batson*'s requirement of a "neutral explanation" the prosecutor must articulate a reason (or reasons) for the challenge that provides the defendant with a sufficient amount of information such that he may show the pretextual nature of the reason (if indeed a pretext does exist). When the *Batson* court determined that the explanation given by the prosecutor must be "related to the particular case to be tried," obviously it did not intend that a venireman could be constitutionally excluded from service on the jury only when there was reason to do so based on a bias for or prejudice against any of the laws or facts that were *unique* to that particular case. As the State aptly points out in its brief (and what the majority does not wish to come to terms with), such would vitiate the use of peremptory challenges and replace them with challenges for cause.

The Supreme Court, in a case decided after *Batson*, countenanced the use of peremptory challenges to achieve legitimate interests, and decided that such interests may include a "qualified and unbiased jury." Specifically, Justice Scalia, writing for the majority in Holland v. Illinois, ___ U.S. ___, 110 S.Ct. 803, ___ L.Ed.2d ___ (1990), declared:

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[2] For clarity the designation of the various parties to the Title VII suit have been altered to the proper designation of parties in a *Batson* problem (e.g. "employer" and "defendant" in the original opinion have been designated "prosecutor"; "plaintiff" in the original opinion is either designated as "venireman" or as "defendant" depending on the context and circumstances).

> "Although the constitutional guarantee runs only to the individual and not to the State, the goal it expresses is jury impartiality with respect to both contestants: neither the defendant nor the State should be favored. This goal it seems to us, would positively be obstructed by a petit jury cross section requirement, which as we have described, would cripple the device of peremptory challenge. We have acknowledged that that device occupies an important position in our trial procedures, and has indeed been considered a necessary part of trial by jury. Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminating extremes of partiality on both sides, thereby assuring the selection of a *qualified* and unbiased jury." 110 S.Ct. at 809 (citations omitted and emphasis added).

Certainly then, the State's use of a peremptory challenge to formulate a "qualified" jury, would be a legitimate (i.e., "race neutral") reason related to the particular case.

In this case, the prosecutor explained that he used a peremptory challenge to remove the venireman because he felt that she was inattentive. The judge who was physically present to see and hear the venireman and to judge her particular demeanor accepted, albeit implicitly, the prosecutor's assessment of the potential juror. In any situation where demeanor will be a significant factor in the assessment of a particular issue on appeal, neither this Court nor the Courts of Appeals is in any position to second guess the findings

of the trial court. Indeed, in the case before us even defense counsel accepted the prosecutor's explanation since he neither questioned the explanation nor even attempted to show a pretextual nature of the explanation. Perhaps even more important, there was absolutely no challenge to the prosecutor's assertion that he had struck "any number of individuals for the same reason." See and cf., Canada v. State, 660 S.W.2d 528, 530 (Tex.Cr.App. 1983) (plurality opinion) (prosecutor's statement that a potential witness was hospitalized and thus unable to testify was accepted by this Court as being true since it was unrefuted by defense attorney at trial); Hicks v. State, 525 S.W.2d 177, 179 (Tex.Cr.App. 1975) (defense attorney's statement that the prosecutor was standing behind the defendant when he raised his voice and looked down at the defendant and said "there is somebody that we haven't heard from in this case," was accepted by this Court as being true since it was "undisputed by the prosecutor and unquestioned and unqualified by the court in whose presence the statement was made.") Considering first, that the defense attorney did not so much as note his disapproval of the prosecutor's explanation, and second, that "[t]he ultimate burden of persuading the trier of fact that the [prosecutor] intentionally discriminated... *remains at all times with the [defense],*" *Burdine*, 450 U.S. at 252-253 (emphasis added), it is inconceivable to me how any appellate court can reverse the conviction in this case. Appellant has simply failed to prove intentional discrimination in the trial court and bases his appellate arguments on mere conjecture and speculation. The majority's decision to allow this opinion to stand as precedent must not go unnoticed.

Also, I cannot accept the Court of Appeals' reasoning that the prosecutor's explanations were inadequate since "no question was propounded" which sought to discover facts and circumstances suggesting that as a juror the venireman might lean in favor of appellant. This may be a factor that the *trier of fact* (i.e. the trial court judge) can consider in determining whether the prosecutor's reasons are merely pretextual when such is actually brought to its attention, but requiring the prosecutor to ask questions concerning bias or prejudice is, and should not be, constitutionally required. See *Burdine*, 450 U.S. at 255 n. 10.[3] See also Id. at 259-260 ("[t]he Court of Appeals erred by requiring the [prosecutor] to prove by a preponderance of the evidence the existence of nondiscriminatory reasons..."). Undoubtedly, if in any case where the record unequivocally demonstrates that a potential juror came to court either unshaven and shabbily dressed or inattentive to the point of sleeping during the voir dire, such alone is sufficient in and of itself to justify the use of a peremptory challenge. I am quite sure that the Court of Appeals and the majority would not require additional questioning in such a case before it would sanction the use of a peremptory challenge to

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[3] The Supreme Court writes:

> "In saying that the presumption drops from the case, we do not imply that *the trier of fact* no longer may consider evidence previously introduced by the [defendant] to establish a prima facie case. A satisfactory explanation by the [prosecutor] destroys the legally mandatory inference of discrimination arising from the [defendant's] initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom *may be considered by the trier of fact* on the issue of whether the [prosecutor's] explanation is pretextual." (Emphasis added.)

remove this potential juror.[4] In the case before us, where the record is not unequivocal, it is simply inexplicable why this Court and the Court of Appeals will not defer to the trial court's findings.

This Court has adopted the "clearly erroneous" criterion as the standard of review for Texas appellate courts in addressing *Batson* issues. Whitsey v. State, 796 S.W.2d 707, 721 (Tex.Cr.App. 1990) (opinion on rehearing). Further, the Court explained that:

> "Although the meaning of the phrase 'clearly erroneous' is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles... is that a finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty... if it undertakes to duplicate*

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[4] Imagine, if you will, the type questions that the Court of Appeals and the majority would have the prosecutor ask the venireman so as to substantiate the use of a peremptory challenge: "Why aren't you interested in this case?" "Am I boring you?" "Didn't you get enough sleep last night?" And after asking these questions, how can any reasonable person expect the prosecutor to keep the venireman whom he has been forced to offend by *having* to ask the questions in the first place. It becomes a no win situation for the State and the majority, oblivious to such, now sanctions this with its "improvident grant" stamp.

> *the role of the lower court*. In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Whitsey*, 796 S.W.2d at 721 (original punctuation altered and citations omitted; emphasis added), quoting Anderson v. Bessemer City, 470 U.S. 564, 573-574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

In the case before us, the trial court found the prosecutor's explanations to be "race-neutral" and there is *nothing* except conjecture before this Court and the Court of Appeals to suggest otherwise. Once again, the defense *never even put into question*-- either by cross-examination or presenting evidence--the prosecutor's explanations in the trial court where such should have been presented and ruled upon. The Court of Appeals clearly engaged in the prohibited *de novo* review of the trial court's decision and clearly placed an improper burden of proof upon the prosecutor to disprove intentional discrimination. The majority's decision to improvidently grant the State's petition ignores the realities of the situation. When one uses the proper *Anderson v. Bessemer City* standard of review that we adopted in the *Whitsey* opinion, it is preposterous to say that the trial court's findings in the case before us

are clearly erroneous. The Court of Appeals is clearly wrong in so finding. The opinion of the Court of Appeals should be reversed and the judgment of the trial court should be affirmed.

Added to the majority's refusal to correct an incorrect published opinion is the fact that the opinion is in conflict with another opinion from the Court of Appeals. The exact issue that is before us today and ripe for consideration was before the Houston Court of Appeals in Gardner v. State, 782 S.W.2d 541 (Tex.App. -Houston [1st Dist.] 1989). There, the appellate court decided just the opposite of what the Tyler Court of Appeals did in the case before us. The Houston court writes:

> "Appellant also argues on appeal that the prosecutor should have asked the two struck black venirepersons direct questions if the prosecutor was bothered by anything she had observed about them.
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> "This Court addressed the same situation in Vargas v. State, 781 S.W.2d 356 (Tex.App. -Houston [1st Dist.] 1989, pet. filed). In that case, as here, the appellant did nothing further to prove his allegations that the State exercised its peremptory challenges in a racially discriminatory manner, or that the prosecutor's neutral explanations were merely pretextual. He did not cross- examine the prosecutor, introduce any documentary evidence, or offer any testimony of his own. In addition there, as here, the appellant did not attempt to compare the challenged black venireperson with any of those venirepersons who were not challenged by the

> prosecution. However, in his brief on appeal, appellant there, as here, offered for the first time on appeal, a comparison of the white venirepersons against whom the State did not exercise a peremptory strike with those black venirepersons struck by the State. This Court held that rebuttal evidence will not be considered for the first time on appeal." 782 S.W.2d at 545.

It is beyond my comprehension why this Court does not exercise its jurisdiction to hear and decide the merits of a case concerning this area of law that has proven troublesome for the Courts of Appeals and will continue to do so.

Because the majority shirks its responsibility to clarify an area of law that needs clarification and lets stands an opinion that is unquestionably wrong, I dissent.

McCormick, Presiding Judge

(Delivered April 24, 1991)

Campbell and White, JJ, join this dissent

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